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Re: Expanded Draft Resolution L-436:
Comments of California Water Association

Dear Mr. Lindh and Mr. Harris:

In accordance with the notice issued by Legal Division on December 14 and the revised schedule set by Legal Division on December 19, 2012, California Water Association ("CWA") hereby respectfully submits its comments on the expanded version of draft Resolution L-436 (the "Expanded Resolution"), which was made available December 14, 2012, and is intended to establish a new approach for the California Public Utilities Commission ("CPUC" or "Commission") to implement and comply with the California Public Records Act ("CPRA"). CWA is a statewide association that represents the interests of investor-owned water utilities subject to the Commission's jurisdiction. CWA previously submitted comments on the initial draft of Resolution L-436 on April 25, 2012, participated in the June 19 workshop regarding the draft Resolution, and commented on the revised draft Resolution on July 27 and September 6, 2012.

I. CWA SUPPORTS PG&E'S COMMENTS IN OPPOSING ADOPTION OF THE EXPANDED RESOLUTION AS LEGALLY FLAWED AND OVERBROAD.

CWA has reviewed a draft of comments to be filed on this date by Pacific Gas and Electric Company ("PG&E") and wishes to express its agreement with PG&E's comments. Specifically, CWA joins PG&E in opposing adoption of the Expanded Resolution on the grounds that it is "legally flawed, overbroad, and a poor use of limited Commission and party resources." In common with PG&E, CWA urges the Commission's Legal Division not to pursue efforts to create "matrices identifying classes of records as public or confidential" and "an online database to include requests received by the CPUC to treat

documents as confidential and the CPUC's responses to such requests." CWA shares PG&E's view that such efforts are unnecessary and unduly burdensome, and that existing practices are working satisfactorily.

II. THE EXPANDED RESOLUTION FAILS TO RECOGNIZE THE COMPLEX ISSUES AND INTERESTS RELEVANT TO CONFIDENTIALITY OF INFORMATION PROVIDED BY UTILITIES TO THE CPUC.

The Expanded Resolution suffers from a fundamental failure to differentiate between documents created by the CPUC and documents provided to the Commission by public utilities. The Expanded Resolution is incorrect in contending that a distinction between records an agency generates and records it obtains from others "would be contrary to the open government emphasis of Cal. Const. Art. 1, §3 and the CPRA." In fact, a right of public access to "the writings of public officials and agencies" is recognized in California's Constitution (Article I, §3(b)(1)), but California's statutory law is more complex – establishing broad rights of access subject to numerous exceptions in the CPRA, while providing a procedural presumption of confidentiality for information submitted by public utilities to the CPUC in Public Utilities Code §583.

The authors of the Expanded Resolution continue to refuse to acknowledge the significance and importance of §583 – both as guarantor of procedural protections for utilities' interest in the confidentiality of some portions of the voluminous amounts of information they routinely submit to the Commission, and as facilitator of the utilities' openness and willingness to provide such information that is essential to the efficient functioning of the Commission's regulatory oversight. To the contrary, the Expanded Resolution continues to understate the importance of §583, erroneously contending that "§583 does not in fact limit our disclosure of records." Expanded Resolution, at 5.

While it may not create any substantive exemption from the disclosure requirements of the CPRA, §583 undeniably imposes procedural requirements before such disclosures may be made – including particularly "an order by the commission or a commissioner in the course of a hearing or proceeding." CWA does not deny the CPUC's authority to designate certain classes of records or information as open to public inspection – or, conversely, to designate certain classes of records or information as confidential – but this is very different from the wholesale delegation of this important function to CPUC staff that is envisioned by the Expanded Resolution.

CPRA §6255 permits an agency to withhold records without reference to any specific statutory exemption if it "can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure." *County of Santa Clara*, 170 Cal.App.4th at 1321. The procedure specified in §583 gives a utility a chance to challenge a proposed disclosure, and by such challenge to provide the CPUC sound basis to demonstrate that "the public interest will be served by withholding the records" at issue.

When considering the relationship between the CPRA and §583, it is illuminating also to consider CPRA §6254(d), which exempts from mandatory disclosure "applications filed with any state agency responsible for the regulation or supervision of the issuance of

securities; examination, operating, or condition reports prepared by, or no behalf of, or for the use of, any such state agency; preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any such state agency, and information received in confidence by any such state agency." The CPUC, of course, is an agency described by §6254(d), for it is, undeniably, "responsible for the regulation or supervision of the issuance of securities" by public utilities subject to its jurisdiction. *See*, Pub. Util. Code, §816 *et seq.* While the CPUC may be reluctant to assert an exemption from obligations under CPRA to the full nominal extent of §6254(d), that exemption certainly justifies denial of requests relating to utility applications for authority to issue securities, to encumber utility plant as security for debt, or to determine costs of capital. The precise limits of the §6254(d) exemption, as applied to the CPUC, are beyond the authority of CPUC staff to determine, which requires "an order by the commission, or a commissioner in the course of a hearing or proceeding," as specified by §583.

III. THE LEGISLATURE HAS EXPRESSLY RECOGNIZED THAT THE CPRA'S PRESUMPTION FAVORING DISCLOSURE DOES NOT APPLY TO PUBLIC RECORDS THAT ARE SUBJECT TO §583.

The California Legislature itself has accorded greater significance to §583 than does the Expanded Resolution. Thus, the legislative history for Senate Bill 1488 (Bowen, 2004), which originally would have amended §583 but ultimately directed the Commission to initiate a proceeding that resulted in D.06-06-066, stated that "the California Public Utilities Commission is the only state agency not subject to the presumption established by the Public Records Act that information in a state agency's control is public, unless specifically exempted from disclosure. The presumption of confidentiality applied to records of the CPUC originated in 1915 . . . ." Senate Judiciary Committee Bill Analysis, April 21, 2004, at 3.

As originally drafted, SB 1488 would have "conformed" §583 to the CPRA "by changing the presumption that utility information held by the CPUC is confidential to a presumption that it is public." Senate Judiciary Committee Bill Analysis, *supra*, at 3. According to the author, this change of presumption would "favor public disclosure by providing that all information furnished by a public utility, or its subsidiary, affiliate or holding company, shall be made public unless a provision of the PRA or the PUC requires it to be withheld." Senate Floor Bill Analysis, May 25, 2004, at 3. Prior to enactment, however, the bill was revised to leave §583 unchanged and to require the CPUC "to initiate a proceeding to review its information disclosure practices to ensure meaningful public participation and open decision making." Senate Floor Bill Analysis, August 31, 2004, at 3; *accord*, Assembly Floor Bill Analysis, August 11, 2004, at 2.

Thus, the California Legislature has recognized that the presumption of disclosure provided for by the CPRA does not extend to documents provided by utilities and their affiliates to the CPUC because of the presumption of confidentiality implicit in §583, and has chosen not to amend either statute in this regard. Instead, the Legislature directed the Commission to initiate a proceeding "to ensure that the commission's practices under these laws provide for meaningful public participation and open decisionmaking." Amended Stats. 2004, c. 690, §1. The Commission did so, eventually issuing D.06-06-

066 to address confidentiality and disclosure concerns relevant to electric utilities' power procurement practices.

IV. THE EXPANDED RESOLUTION STILL FAILS TO RECOGNIZE THE COMMISSION'S AUTHORITY TO EMPLOY §583 TO DEFINE CLASSES OF INFORMATION PROTECTED FROM DISCLOSURE AND THE COMPELLING NEED FOR SUCH PROTECTION.

The Expanded Resolution continues to propose revisions to General Order ("G.O.") 66-C that would require disclosure of all records except those subject to an exemption specified in CPRA or another provision of law. *See, e.g.*, Expanded Resolution, at 7. This proposal fails to recognize the Commission's discretion, pursuant to §583, to identify classes of records or information as confidential and not subject to public inspection. Similarly, the Expanded Resolution's declared intention to presume that all information provided to the Commission is publicly available, absent an approved request for confidential status (Expanded Resolution, at 12 n. 19), would turn the procedural protection traditionally guaranteed by §583 and secured by G.O. 66-C on its head – ensuring that utilities in future would have to think twice before making proprietary information readily available to CPUC staff.

Responding to comments proposing that the CPUC may create its own categories of information exempt from disclosure, the Expanded Resolution responds that "we should not adopt such exemptions without a thorough analysis of potentially conflicting interests for and against disclosure." *Id.* at 63. CWA agrees, but is disappointed that the analysis that follows is unduly biased in favor of unlimited disclosure. Unwilling to commit to the protection of sensitive utility infrastructure information, or information that may place a utility at a competitive disadvantage, the Expanded Resolution insists on tying disclosure limits to CPRA exemptions or privileges, but is willing to consider application of the official information privilege recognized in Cal. Evidence Code, §1040. Expanded Resolution, at 68, 71-72. If such consideration is to be given in the planned workshop context, it is important that adequate time and an adequate forum be provided in that plan to address the particular security and business concerns of CPUC-regulated water utilities.

Easy access to documents filed with the Commission in this new era of electronic data bases can result in a wide range of abuses. A recent example was experienced by CWA member Park Water Company, which had been subject to a change of ownership for which CPUC authorization was sought by Application 11-01-019 and granted by Decision 11-12-007. The Merger Agreement, filed as an exhibit to the Application, provided for a $10 million escrow deposit with Wells Fargo Bank, and was signed by representatives of the parties to the transaction. Nine months later, a fraudulent order to transfer funds from the escrow account to a foreign bank was delivered to Wells Fargo Bank, with signatures on the letter of instructions identical to the signatures on the Merger Agreement. Fortunately, an alert bank officer smelled a rat and brought the fraud to Park Water's attention. Counsel for Park Water informed the Commission's General Counsel of these events by letter of October 29, 2012, noting that the utility will in future seek to file under seal any financially significant documents bearing signatures of its executive officers that must be filed with the Commission. As Park Water's counsel noted in that letter, "[s]uch protections can be effective only if the Commission continues to maintain a

policy of protecting the confidentiality of commercially sensitive information that is provided to the Commission." Letter of Martin A. Mattes to Frank Lindh, October 29, 2012.

Surprisingly, the Expanded Resolution shows reluctance to protect personal information about utility employees and customers from public disclosure. CWA urges the Commission to recognize that the confidentiality of personal information about employees and customers of CPUC-regulated utilities is at least as much entitled to protection as is the personal information of persons employed or served by a public agency. Thus, while CPRA §6254.3 and §6254.16 protect against disclosure of personal information of state employees and utility customers of local agencies, the Commission should implement its authority pursuant to §583 to protect from disclosure the equivalent information of CPUC-regulated utility employees and customers.

In this context, the Expanded Resolution cites *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, to support an assertion that where professional competence is at issue, courts may find that even significant employee privacy interests are outweighed by other considerations. In *BRV, Inc.*, however, the employee involved was a school superintendent, whom the court considered to be a public official with a lesser privacy interest than any of the students, parents, staff, or faculty members mentioned in the report, whose identities did not need to be disclosed.[1] The vast majority of utility employees and customers are not public officials. Any public interest in disclosing their personal information deserves little weight in relation to their Constitutional and statutory rights to privacy.

V. THE EXPANDED RESOLUTION IMPROPERLY WOULD DENY UTILITIES NOTICE AND OPPORTUNITY TO OBJECT TO REQUESTS FOR PUBLIC DISCLOSURE OF INFORMATION PROVIDED TO THE CPUC.

The authors of the Expanded Resolution have consistently failed to recognize public utilities' legitimate proprietary interest in the confidentiality of certain information they provide to the Commission. One consequence of this failure was a rejection of CWA's and the Sempra Utilities' request that utilities be given notice of records requests and subpoenas seeking information they provided to the CPUC with opportunity to object to disclosure and to appeal rejections of such objections, all prior to disclosure. A prior version of the resolution relied on "[p]ractical considerations such as staffing constraints" and CPRA time limits to "preclude" adoption of such "extensive" pre-disclosure notification procedures, suggesting that it would be sufficient for CPUC staff to post records requests and subpoenas on the CPUC web-site, which would avoid "unrealistically burdening staff

[1] CWA is troubled by the addition to the Expanded Resolution of an extensive footnote quoting a barely relevant court decision regarding access to retail customer information in the context of a consumer class action to justify speculation that "we may be exercising an over-abundance of caution" in protecting customer contract information. Id. at 76 n. 80. This is just one example of the Expanded Resolution's rambling commentary on contentious, but sensitive issues that could set unfortunate and unintended precedents if not carefully reviewed and edited prior to adoption by the Commission.

with a duty to contact regulated entities each time the CPUC receives a records request or subpoena." *Id.* at 30.

The Expanded Resolution now evidences a lack of concern for due process that goes deeper than issues of practicality. Returning to the question of "pre-disclosure notice" later in the disjointed document, the authors assert not only that "it is not practical for us to provide individual notice in every case," but it is neither necessary nor desirable. According to the Expanded Resolution, CPUC staff is able to respond to records requests and subpoenas without outside help, so "no input from regulated entities is required." And given the need to respond promptly to CPRA requests, there is not time to send notices, wait for replies, and respond to them while still responding to CPRA requests on a timely basis. *Id.* at 93. The Expanded Resolution also denies that the Commission has authority to require CPRA requesters to engage in any type of meet and confer process with a utility provider of information. *Id.* at 94.

This dismissal of utilities' due process concerns for the protection of their arguably proprietary or otherwise confidential information is truly disturbing and unwarranted. It should be easy to identify the utility to which any records request pertains. Providing legally sufficient notice to a previously designated contact person for that utility should be easy as well. Giving "notice" by posting on a web-site is inadequate, especially in view of the short statutory time limits to which the Expanded Resolution refers.

Section 583 is of equal statutory weight to CPRA. The Commission has authority to establish reasonable procedures for implementing §583, as it has done through G.O. 66-C and its predecessors. Those procedures may – and should – provide adequate notice and opportunity to object and appeal for public utilities whose proprietary interests are placed at risk by their submission of information to the Commission. They may – and should – supersede compliance with CPRA's time limits in some cases. Those procedures also may – and should – provide an option for a requesting party to meet and confer with the utility whose information is requested in order to expedite the satisfaction of the requester's need for information in a way that does not unduly reveal information submitted to the CPUC under a justified claim of confidentiality.

VI. THE "NEW OPTION" THE EXPANDED RESOLUTION PROPOSES FOR ADDRESSING CONFIDENTIALITY REQUESTS WOULD BE VERY COMPLEX AND COSTLY TO IMPLEMENT.

In response to concerns about the burdensome nature of procedures outlined in proposed G.O. 66-D, the Expanded Resolution offers a "New Option for Consideration." This new approach would rely on "a number of resource libraries, databases, and records tracking systems that do not currently exist" in order to create "an integrated and accessible system for processing requests for confidential treatment." This putative system would include "a series of new industry, division, or subject matter matrices of public and confidential records," would allow for adoption of "entity-specific standard public and confidential status resolutions," and would permit use of "short-form references" to such matrices and resolutions on records thereafter submitted by a utility. It would also provide for more detailed requests for confidential treatment of records falling outside an established matrix and requiring monthly reports by the utilities regarding

requests for confidential treatment and public and confidential status designations. Expanded Resolution, at 95-96. All this material would be incorporated by reference into the Public Records Office ("PRO") resolution that an earlier version of the Expanded Resolution proposed to have the PRO submit for the Commission's review and adoption at each Commission decision meeting. *Id.* at 97.

This "New Option" is a recipe for regulatory overkill, bureaucratic torpor, higher utility rates, and a waste of public funds. Indeed, the utilities will have to incur unwarranted and wasteful expenses evaluating the confidentiality of information to be submitted to the CPUC, monitoring the status and contents of matrices, libraries, databases and other records ("that do not currently exist"), deciding what requests for confidential treatment to make and on what bases, filing monthly reports on all these activities, then monitoring and trying to influence drafting of PRO resolutions and the Commission's adoption thereof, and finally seeking reconsideration and appeal of such resolutions that trample on their confidentiality interests and concerns. The CPUC will have to hire many more attorneys to cope with all these matters. And members of the public seeking information from the Commission *may* benefit. Or maybe not.

VII. IF THERE ARE WORKSHOPS, THERE SHOULD BE ONE SPECIFIC TO WATER UTILITIES.

The Expanded Resolution outlines in considerable detail the topics to be considered in future workshops addressing procedural issues, safety-related records, records of communications providers, energy-related records. *Id.* at 106-07. Notably missing from the workshop plans and agendas are any issues specific to the many water utilities, large and small, subject to CPUC jurisdiction. If, despite all the good reasons to abandon this effort, the Commission proceeds with workshops aimed to implement a new G.O. 66-D, then CWA requests that a separate workshop be scheduled to address the confidentiality issues of concern to water utilities in the following contexts: (i) general rate cases; (ii) advice letter filings; (iii) other formal proceedings; (iv) periodic reports; (v) staff audits and investigations; (vi) small water company operations; and (vii) other situations.

VIII. ANY NEW GENERAL ORDER SHOULD BE PROSPECTIVE ONLY.

The Expanded Resolution includes a new proposed Finding of Fact 22, which would favor a presumption "that records and information furnished to the CPUC by regulated entities are public unless the regulated entity requests confidential treatment at the time the records or information are submitted to the CPUC." *Id.* at 112. This is a fair presumption, but only if it is applied on a prospective-only basis.

Standard historical practice at the Commission has been for utilities to provide information to the CPUC and to CPUC staff (including DRA) without the sort of confidentiality notations that are typically applied in civil discovery. The basis for this standard practice has been the utilities' reliance on the protections of §583 and G.O. 66-C, which have provided substantial – while not ultimately guaranteed – confidentiality protections without any requirement that documents be marked in any way. When parties have marked documents with such terms as "Confidential per §583 and G.O. 66-C," this

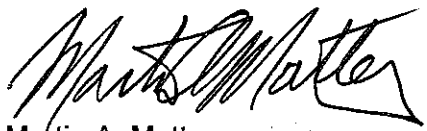
has been done as a means of providing practical notice of confidentiality concerns rather than as a legal necessity.

Accordingly, if the Commission chooses to adopt Finding of Fact 22, it should be modified by adding the phrase, "after the effective date of this Resolution," after the word "entities" in line 2 of the Finding. Likewise, if the Commission chooses to adopt Conclusion of Law 89 (on page 125), it should be modified by inserting the phrase, "after the effective date of this Resolution," after the reference to "CPUC" in line 2 of the Conclusion.

IX. CONCLUSION

These comments have detailed a number of very concerning flaws and deficiencies in the Expanded Resolution that should give the Commission pause before granting its approval. With PG&E, CWA urges the Commission to recognize that the Expanded Resolution is legally flawed, overbroad, and would lead to a poor use of limited Commission and utility resources. CWA urges the Commission to work within the structures of §583 and G.O. 66-C to define appropriate categories of confidential and publicly available information but to avoid any retroactive application of determinations that are less protective of confidentiality concerns than current practice.

Very truly yours,



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